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NEOLIBERAL LAND CONSERVATION AND SOCIAL JUSTICE

Jessica Owley*

Introduction

The protection of private land is an important component of land-protection efforts. In the United States, most land is privately owned, with some of the most important lands - from an ecological standpoint - in private hands.¹ In seeking ways to protect ecologically important lands, three main routes have developed. At national and sub-national levels, governments seek to protect land through regulation. However, a lack of coordination combined with political challenges in both passing and enforcing land-protection regulation has stymied this technique. Where regulation has proven inadequate - or where lands are identified as particularly significant from a cultural, historical, or ecological standpoint - governments purchase land outright and hold the properties in fee simple. Land purchase is, however, a limited technique. Not only is it an expensive and logistically onerous process, but it may involve removing people from the land.

In this context of dissatisfaction with regulation and fee-simple purchase of land, a third route has emerged: using private agreements, including conservation easements. Conservation easements are non-possessory interests in land held by either a government entity or a non-profit conservation organization (called a land trust). Conservation easements follow rubrics outlined by each state's law, leading to some variations in the tool. Generally, however, conservation easements are

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¹ D. Clark and D. Downes, 'What Price Biodiversity? Economic Incentives and Biodiversity Conversion in the United States' (1996) 11 *Journal of Environmental Law and Litigation* 9 at 10.

perpetual restrictions on the land that seek to fulfill an environmental purpose. They have an advantage over regulation because they can be tailored to an individual parcel and are not associated with complicated legislative procedures. As conservation easements commodify nature and put monetary values on ecological services, they fit into the growing context of neoliberal environmental governance.²

Part 2 of this article situates conservation easements in the neoliberal framework and summarizes the growth of conservation easements, demonstrating how the agreements result primarily in benefits for wealthy Americans. Part 3 describes the social concerns associated with conservation easements, and Part 4 suggests ways to address some of the environmental justice and equity concerns raised by conservation easements and cautions against a too enthusiastic embrace of the tool.

Conservation Easements in the United States

Neoliberal Conservation

The wilderness conservation approach has dominated the conservation movement in the United States and elsewhere.³ This approach focuses on isolating and protecting designated environmental areas or amenities from human impact. Implicit is the assumption that human activity will negatively affect environmental resources and, therefore, human interaction with those resources should be eliminated, reduced, or controlled. National park programs (like the National Park Service in the United States) epitomize this approach. However, alongside this approach, conservationists seek methods that enable people to remain on the land, avoid the burdens and costs of fee-simple land ownership, and draw upon alternative environmental governance structures. Property-rights-based tools embodied by conservation easements fit that niche.

Conservation easements are part of a trend of compensating landowners for environmental services and amenities. They are part of a soft environmental policy

² N. Heynen and P. Robbins, 'The Neoliberalization of Nature: Governance, Privatization, Enclosure, and Valuation' (2005) 16 *Capitalism Nature Socialism* 5; N. Castree, 'Neoliberalizing Nature: Processes, Effects and Evaluations' (2008) 40 *Environment and Planning A* 153; N. Castree, 'Neoliberalizing Nature: The Logics of Deregulation and Reregulation' (2008) 40 *Environment and Planning A* 131.

³ P. West, J. Igoe and D. Brockington, 'Parks and Peoples: The Social Impact of Protected Areas' (2006) 35 *Annual Review of Anthropology* 251 at 255.

that reinforces the neoliberalization of conservation.⁴ Soft policies involve instruments that are flexible, subject to negotiation, and consistent with market approaches.⁵ In these approaches, market forces are harnessed in an effort to improve ecosystem management and enhance human well-being. In this respect, neoliberalism restructures conservation mechanisms to facilitate the spread of market-based mechanisms.⁶ One of neoliberalism's chief techniques for achieving that goal is reregulating nature through forms of commodification. Commodification is a process whereby states transform previously untradeable things into tradable commodities.⁷ By recognizing the right to develop land as a property right that can be broken off the property-rights bundle, conservation easements do just that. The win-win aspect of conservation easements wherein landowners receive compensation, developers receive permits, and the public receives increased environmental protection appears to fit into the neoliberal 'promise of a world where one can eat one's conservation cake and have development dessert too'.⁸

Conservation Easement Basics

Conservation easements are non-possessory interests in land restricting landowners' ability to use their land in an otherwise permissible way with the goal of yielding a conservation benefit.⁹ All fifty states have conservation easements statutes affecting nearly nine million acres of land.¹⁰ Conservation easements vary in duration, but most are perpetual. Indeed, the desire to make long-term and perpetual land-

⁴ S. Logan and G. Wekerle, 'Neoliberalizing Environmental Governance? Land Trusts, Private Conservation and Nature on the Oak Ridges Moraine' (2008) 39 *Geoforum* 2097.

⁵ B. Swallow, M. Kallesoe, U. Iftikhar, M. van Noordwijk, C. Bracer, S. Scherr, K. Raju, S. Poats, A. Duraiappah, B. Ochieng, H. Mallee and R. Rumley, 'Compensation and Rewards for Environmental Services in the Developing World: Framing Pan-Tropical Analysis and Comparison' (2009) 14 *Ecology and Society* 26 (available at www.ecologyandsociety.org/vol14/iss2/art26/).

⁶ J. Igoe and D. Brockington, 'Neoliberal Conservation: A Brief Introduction' (2007) 5 *Conservation & Society* 432 at 433-34.

⁷ N. Castree, 'Neoliberalizing Nature: Processes, Effects and Evaluations' (supra note 2).

⁸ L. Grandia, 'Between Bolivar and Bureaucracy: The Mesoamerican Biological Corridor' (2007) 5 *Conservation & Society* 478 at 480.

⁹ See, for example, National Conference of Commissioners on Uniform State Laws, 'Uniform Conservation Easement Act 1981, s.1(1)' (available at http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.htm).

¹⁰ K. Chang, *2010 National Land Trust Census Report* (2011) Land Trust Alliance, Washington D.C. 5 (available at <http://www.landtrustalliance.org/land-trusts/land-trust-census/national-land-trust-census-2010/2010-final-report>). The Land Trust Alliance's census calculates the amount of land protected by conservation easements held by land trusts but does not include national land trusts like The Nature Conservancy. Furthermore, because the acreage protected by government entities is unknown, the total number of protected acres is likely much higher.

conservation restrictions is one of the chief reasons states passed conservation-easement statutes.¹¹

There are a number of ways in which conservation easements can be created, the most common of which is for landowners to place conservation easements on their land voluntarily. When doing so, the landowner is agreeing to refrain from exercising certain rights.¹² These rights can include the right to develop, the right to farm in a certain manner, and the right to fill in wetlands. The holder of the conservation easement has the right to bring an action against the landowner if the landowner violates the terms of the conservation easement. Under most state laws, the conservation-easement holder can be either a government entity or a non-profit conservation organization.

Landowners create conservation easements in a few ways. First, many landowners donate conservation easements burdening their land. They may do so for several reasons, the chief of which are usually a desire to preserve the character of land and to receive a tax break.¹³ Conservation easements, like other property rights, can also be sold.¹⁴ Increasingly, however, conservation easements are coming into being not based on donations or sales. Instead, they emerge from large development projects with complex permitting programs.¹⁵ Developers encumber land with conservation easements in exchange for the local, state, and federal permits needed for their projects to proceed.

¹¹ J. Hocker, 'Foreword' in J. Gustanski and R. Squires (eds), *Protecting the Land: Conservation Easements Past, Present, and Future* (2000) Island Press Washington D.C. at xvii, xvii–xviii (explaining that states adopted such statutes because the long-term enforceability of negative easements in gross was questionable); see also J. Owley, 'The Emergence of Exacted Conservation Easements' (2006) 84 *Nebraska Law Review* 1043 at 1075–77

¹² Conservation easements may also have affirmative obligations, such as requiring restoration projects.

¹³ J. Gustanski and R. Squires, 'Preface' in J. Gustanski and R. Squires (eds), *Protecting the Land: Conservation Easements Past, Present, and Future* (2000) Island Press Washington D.C. at xxi.

¹⁴ A. Merenlender, L. Huntsinger, G. Guthey and S. Fairfax, 'Land Trusts: Who is Conserving What for Whom?' (2004) 18 *Conservation Biology* 65 at 67.

¹⁵ Owley (supra note 11).

Conservation Easement Concerns

Concerns regarding the ecological value and enforceability of conservation easements have led some to question their use.¹⁶ Essentially, from the perspective of the public, conservation easements may not be the best way to protect land. Conservation easements usually work to protect a static landscape in perpetuity despite increasing acknowledgement that the natural world is ever-changing.¹⁷ Additionally (and paradoxically), there are some concerns that conservation easements may not last as long as they purport to. Statutory language often indicates conservation easements should follow the same rules as traditional easements. This may enable amendment or dissolution of conservation easements - which may negate the positive ecological benefits associated with them.

Additional social concerns inherent in the use of conservation easements may make them an undesirable tool. First, for reasons of democracy and accountability, it may be better to make land-use decisions via political processes. Second, conservation easements generally reduce tax revenues, reducing funds available for social and environmental programs. Third, because of the nature of conservation easements and their attendant landowner benefits, conservation easements are most likely to be used in rural and suburban areas and most likely to benefit the wealthy - raising concerns regarding equity and environmental justice.

Democracy and Accountability

Conservation easements are undemocratic: their use enables a landowner and land trust working together to trump local zoning laws. Zoning draws upon the local police power to protect and promote the health, safety, and welfare of a community. This means zoning decision makers are accountable to the democratic process through election or appointment. Additionally, officials enact zoning laws and make land-use decisions publicly. When private organizations and individuals gain the ability to

¹⁶ See, for example, J. Owley, 'Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements' (2011) 30 *Stanford Environmental Law Journal* 121; see also J. Owley, 'Conservation Easements at the Climate Change Crossroads' (2011) 74 *Law and Contemporary Problems* 199.

¹⁷ A. Rissman, 'Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes' (2011) 74 *Law and Contemporary Problems* 145; H. Doremus, W. Andreen, A. Camacho, D. Farber, R. Glicksman, D. Goble, B. Karkkainen, D. Rohlf, A. Tarlock, S. Zellmer, S. Jones and Y. Huang, 'Making Good Use of Adaptive Management' (2011) Center for Progressive Reform Washington D.C. (available at http://www.progressivereform.org/articles/Adaptive_Management_1104.pdf).

circumvent this public process and engage in private land-use planning, the democratic process suffers.

This problem can continue throughout the life of conservation easements as monitoring and enforcement are often left to private organizations too. If conservation easements are created under state and federal laws or enabled through public funding, the public has an interest in the agreements being enforceable. But where the conservation easement is held by a non-profit conservation organization rather than a government entity, it is unclear that the public can hold the non-profit conservation organization accountable if it mismanages the public interests. There is no ballot box solution, usually no requirement for public participation, and few states allow public enforcement. Some scholars assert that the organizations are accountable to the public because as non-profit charitable organizations, they are subject to review by state attorneys general and the Internal Revenue Service (IRS).¹⁸ However, such review has been inconsistent in practice and is, in any event, discretionary.

Tax Issues

Concerns surround the tax breaks associated with conservation easements at the state, local, and federal levels. The IRS has expressed its concern over deductions for donated and bargain sale conservation easements-calling into question the validity and accuracy of valuation of many conservation easements. It asserts that some taxpayers claim deductions far exceeding the value of their land restrictions.¹⁹ When conservation easements are valued too highly, the public pays too much for

¹⁸ S. Fairfax and D. Guenzler, *Conservation Trusts* (2001) University Press of Kansas Lawrence, KS at 153.

¹⁹ J. Stephens and D. Ottoway, 'IRS Toughens Scrutiny of Land Gifts' *Washington Post* (2004) Washington, DC (available at <http://www.washingtonpost.com/ac2/wp-dyn/A19102-2004Jun30?language=printer>).

them.²⁰ A congressional committee evaluating conservation easements concluded that the benefit of conservation easements is 'tenuous and speculative'.²¹

Beyond the questions of proper valuation and justifiable conservation values attained, allowing a tax deduction for conservation easements may not be the best use of public funds. Depending on the loss of tax revenues, it may be more economically efficient to collect the taxes and use the money to purchase land in fee. Alternatively, if the same conservation goals can be met via regulations instead of conservation easements, it may be more fiscally sensible to prohibit the tax deduction and encourage land protection through regulatory channels.

Along with the federal tax deductions for donations, most owners of encumbered land also receive local and state tax benefits because of reduced property values. Land trusts and other conservation-easement proponents often tout reduced property taxes as one of the chief benefits of conservation easements, but reduced property tax revenue means less money for schools and other public projects.

Environmental Justice and Equity

In much of this discussion, in other scholarly works, and even in the IRS code, conservation easements are spoken of as providing a public benefit. Left unanswered, however, is the question of who is meant by the public. Although conservation easements may yield wide-ranging environmental benefits from which everyone gains, many of the specific benefits associated with conservation easements go to wealthier sectors of society.²² Wealthy landowners receive tax breaks so they can maintain their lifestyle while agreeing to conservation easements restricting development that they may never have intended to allow. Take the example of historic façade easements. The government gives landowners a tax

²⁰ See, for example, *Hollis v Stonington Development, LLC*, 394 SC 383 (2011). A developer placed a fifty-foot wide conservation easement on some its land in an effort to appease unhappy neighbors. The developer advised neighbouring proprietors that the conservation easement prevented the developer from cutting down trees, but then proceeded to cut down the trees. Thus, the developer either misrepresented the nature of the conservation easement to the neighbors and/or violated its terms. Nevertheless, the developer received a \$1 million charitable tax deduction for agreeing to the restriction.

²¹ J. Stephens, 'Panel Advises Ending Tax Breaks for Easements' *Washington Post* (2005) Washington, D.C. (available at <http://www.washingtonpost.com/wp-dyn/articles/A42697-2005Jan27.html>).

²² D. Halperin, 'Incentives for Conservation Easements: The Charitable Deduction or a Better Way' (2011) 74 *Law and Contemporary Problems* 29 at 31.

deduction to maintain their historic façades-something few homeowners had intended to change.

Conservation easements are a tool used by people who own land. Additionally, for donated conservation easements, landowners must have enough income for the tax breaks to be worthwhile. Increasingly, conservation easements stem from exactions associated with development permits. Exacted conservation easements are even more likely to concentrate wealth as they facilitate development by wealthy investors. By acceding to conservation easement exactions, developers can obtain governmental permission to convert ecologically sensitive lands. Prior to the use of conservation easements, permission would either not be forthcoming in these circumstances or other types of restrictions, which may have been less palatable to developers, would be required.²³

The tool is usually used over large tracts of land. These open spaces are often at some distance from urban areas where the majority of people live. This makes it harder for most Americans to enjoy directly the amenities provided by conservation easements. Conservation easements preserve land, including open space, through private means. If conserved land is public, there are often opportunities for recreation and access. With conservation easements, conservation organizations and government agencies use public money to preserve land, but, because the land remains in private hands, it is unusual to have public access. Instead only the landowners and their licensees get to enjoy access and recreation opportunities.

Re-envisioning Conservation Easements

Conservation easements have generally been used in a way that benefits wealthier communities. Increasingly, governments and conservation organizations are also purchasing conservation easements as part of efforts to protect working landscapes. This movement has the benefit of recognizing the connection of people to land (and rejecting the hegemony of park-based land-protection schemes). There are also additional changes that could be made to conservation easement use that would address some of the environmental justice concerns discussed above.

²³ Owley (supra note 11) at 1095-1100.

Increase Public Participation in Formation and Enforcement

Conservation easements are often privately negotiated agreements between landowners and prospective conservation easement holders. Members of the public have little to no involvement in the creation of these private agreements. They do not get to voice concerns over either placement of the restrictions or their terms. Some states have public procedures for at least certain categories of conservation easements that include a public review process.²⁴ Although members of those communities may not have the opportunity to vote on conservation easements, they play a role in the process by voicing opinions and influencing outcomes. Increasing opportunities for public involvement may help increase the justice and equity of conservation easements. Such provisions should be extended to cover all conservation easements.

The democracy concerns of conservation easements are mirrored by accountability concerns. Community members are not involved on the front end of these agreements and are often left out of the back end as well. Once a conservation easement is placed on a parcel of land, it is challenging for community members to learn of the restriction or police its terms. Although conservation easements are recorded public documents, like property deeds and other land restrictions, they can be hard to find and understand.²⁵ Searching through county recorders' offices for conservation easements can be hampered by inconsistent labeling and inaccurate filing. Increasing transparency through improved recording systems perhaps including an online portal would enable members of the public to review and evaluate conservation easements. They could use this information to lobby for increased or decreased use of the tool as well as perform citizen-monitoring functions by tracking conservation easements violations.²⁶

When conservation easements are violated, citizens may once again find themselves without a voice. Most state statutes and conservation-easement agreements do not

²⁴ See, for example, Maryland Code Annotated Ch. 184 s. 32. See also J. Owley, 'Use of Conservation Easements by Local Governments' (in press) in P. Salkin and K. Hirokawa (eds) *Greening Local Government* (A.B.A. Publishing Chicago, IL).

²⁵ A. Morris and A. Rissman, 'Public Access to Information on Private Land Conservation: Tracking Conservation Easements' (2009) *Wisconsin Law Review* 1237.

²⁶ Of course, without access to the properties, members of the public are hampered in enforcement actions even in jurisdictions recognizing public enforcement routes.

allow for citizen enforcement.²⁷ The only clear enforcers are the holders of the conservation easements, but it is not certain what can be done when holders choose not to enforce. As indicated earlier, some statutes enable enforcement by other public officials, and arguably conservation easements can always be enforced by state attorneys general. Such public enforcement (where it is even available) is discretionary however. Facilitating public enforcement (by amending state laws to include a citizen suit provision for example) would increase the security that conservation easements will yield a public benefit.

Change the Tax Incentives

Reimagining conservation easements as a tool of social justice will involve changing the level and structure of both property tax benefits and charitable tax deductions. Dan Halperin recommends that the IRS either place a cap on the tax deduction or use a grant program for conservation easements instead of tax deduction.²⁸ A grant program could enable an improved assessment of the public benefit of a conservation easement. Additionally, grant administrators could work to improve the equitable distribution of conservation easements by directing more strategic placement of protected lands.

Removing the federal income tax deduction does not address concerns associated with reduced property taxes. Where communities use democratic and public processes to establish conservation easements, they can make an informed decision about whether the reduced property tax revenue is worth the conservation benefit gained. Alternatively, conservation easement holders could require greater endowments per conservation easement held and use the income from the endowment to monitor and enforce the restrictions or to make payments in lieu of taxes to support schools and social programs.

²⁷ See, for example, *McEvoy v. Palumbo*, 2011 WL 6117924 (Super. Ct. Conn. Nov. 15, 2011) (explaining that no citizens, not even adjoining landowners, have standing to enforce conservation easements in Connecticut); *Long Green Valley Assoc. v. Bellevale Farms, Inc.*, No. 0228 (Maryland Ct. of Special Appeals Nov. 30, 2011) (enabling a neighbor to enforce, but holding that citizens cannot enforce under either third-party beneficiary or charitable trust theories).

²⁸ Halperin (*supra* note 22) at 45.

Reconsider Conservation Easement Placement

When William Whyte first coined the term conservation easement in 1959, he presented the tool as a method for protecting urban land.²⁹ Whyte suggested that government agencies identify key open space areas and then purchase development rights in those areas from landowners. He saw the tool as curbing sprawl. Indeed, the first conservation-easement-like agreements protected the Fens in Boston (a public parkway that forms part of Boston's Emerald Necklace). Despite this early connection of conservation easements with urban landscapes, few conservation easements today are in urban settings even though nearly eighty percent of the United States' population lives within metropolitan regions.

In addition, urban areas in the most need of high quality recreational space and amenities from protected areas may be the ones least likely to be protected by conservation easements. In part this is because, where the landowners have low incomes, tax deductions provide little incentive for entering into conservation easements. Even where the landowner might be tempted by a tax deduction, the lands themselves may have such a low value (due to the depressed land prices in blighted urban areas) that conservation easement valuation is too low to seem worth encumbering the land in perpetuity. The use of grants, as discussed earlier, may go some way to addressing these criticisms, but other tools may also be useful and some of these are already being used.

Many of the examples of conservation easements in urban settings involve publicly owned property, big development projects, or both. For example, the City of Richmond, Virginia, encumbered city-owned urban parkland with a conservation easement to ensure that the property would remain publicly accessible open space. Large commercial entities in Detroit donated conservation easements over land along the Detroit River. In Chicago, coalitions of land trusts are working with the Land Trust Alliance and other organizations on an initiative called Chicago Plan II to protect natural areas within the city limits.³⁰

²⁹ W. Whyte, 'Securing Open Space for Urban America: Conservation Easements' (1959) 36 *Urban Land Institute Technical Bulletin* 2.

³⁰ *Chicago Plan II* (2011) Land Trust Alliance, Washington D.C. (available at <http://www.landtrustalliance.org/about/regional-programs/mw/Chicago>).

While these efforts are innovative in seeking to protect urban lands, they leave something to be desired in terms of public benefit and equitable distribution of environmental amenities. The property in Richmond was already owned by the public and provided environmental amenities to the community. In Detroit, General Motors and other companies donated conservation easements on land they were unlikely to build on (and which would have been hard to sell in the current market) and received large tax deductions for their generosity. Most of the organizations involved in Chicago Plan II work in neighboring rural and suburban counties, with only one organization, NeighborSpace, working to protect land within the city.³¹ Projects like these recognize the need to provide environmental amenities to all citizens but must be expanded. Where land trusts work with local governments to identify important ecological amenities and opportunities, the use of the tool can become more equitable.

Conclusion

The section above presents suggestions for making conservation easement use more equitable. However, some of the most vital concerns associated with conservation easements arise from the essence of the tool as a commodification of nature and a facilitator of development. As we use protected areas to provide mitigation to offset the spread of environmentally destructive commercial activities, the number of protected areas increases but so too does the level of environmentally destructive activities. Such considerations call into question the use of conservation easements for environmental protection.

Conservation easements are part of a worldwide trend of neoliberalizing nature. The problem with commodification of the landscape to make it fit more easily into a free-market system is that it neglects equity and justice. Conservation easement use is not marked by efforts to distribute environmental amenities, often because the driving forces of these land protection efforts stem from different mandates and perspectives. As shown here, it is not only the use of the tool, but the structure of the tool itself that presents concerns for democracy and public access.

³¹ Ibid. See also NeighborSpace (available at <http://neighbor-space.org/main.htm>), describing the organization's efforts to protect community gardens but not indicating that NeighborSpace uses conservation easements.